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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 721

HARRY FRANCIS,

Petitioner,

No. 9698

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioner, Harry Francis, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming a judgment of the District Court of the United States for the Southern District of Indiana, entered on July 18, 1948.

The opinion of the United States Court of Appeals, affirming said judgment, filed February 1, 1949, is not yet reported. A petition for rehearing was filed in said United States Court of Appeals, which petition was denied by said Court on March 11, 1949, without opinion, one Judge voting to grant said petition for a rehearing.

Summary and Short Statement of the Matter Involved.

The petitioner was charged by a grand jury indictment in the District Court, with having devised and intending to devise a scheme and artifice to defraud chiropractors, naturopaths, and other members of the non-medical healing business and to obtain money by means of certain alleged false and fraudulent pretenses, representations, and promises. It is further alleged in said indictment that petitioner, for the purpose of completing the execution of said scheme and artifice and attempting so to do, caused letters to be placed in authorized depositories for mail matter (Tr. pp. 1-4). A plea of not guilty was entered (Tr. p. 5) and a trial was had upon said indictment before a jury, which returned a verdict of guilty (Tr. p. 46). Judgment was entered by the District Court upon the verdict, that petitioner be imprisoned for a period of three and one-half years and that he be fined in the sum of $500. (Tr. p. 48.) Notice of appeal to the United States Court of Appeals for the Seventh Circuit was duly given and filed (Tr. pp. 50-51) and thereafter within the time allowed by law a statement of points upon which petitioner relied on appeal was duly filed (Tr. pp. 51-53), in which it was stated, in substance, that the District Court erred in not sustaining petitioner's motion for acquittal, filed at the close of the Government's evidence in chief; that the District Court erred in not sustaining petitioner's motion for acquittal, filed at the conclusion of all of the evidence in the cause; that there is no substantial evidence in the record of this cause that the petitioner devised an artifice and scheme to defraud the persons named in

the indictment, or in either count thereof; that the evidence is insufficient to sustain the verdict of the jury as to either count thereof; that the verdict of the jury is contrary to law; that the judgment of the Court upon the verdict of the jury is not sustained by sufficient evidence and the judgment of the Court is contrary to law (Tr. pp. 51-53).

Said appeal was determined by the said United States Court of Appeals on February 1, 1949, at which time said Court entered its written opinion affirming the judgment of the District Court. Thereafter, on February 11, 1949, petitioner filed a petition in writing in said Court for a rehearing of said cause, with supporting brief, which petition was denied by said Court on March 11, 1949, District Judge Duffy voting to grant said petition.

Petitioner thereupon filed a petition to stay the issuance of mandate by said court, which petition was granted and the issuance of mandate was ordered stayed pursuant to Rule 25 of the rules of said court.

The Evidence.

The evidence before the trial court disclosed the following:

Petitioner had lived in Indiana since 1939 and operated the Indiana Physiotherapy College, an Indiana corporation formed in 1911. The American Physio-Therapy Institute, incorporated in Washington, D. C., was admitted to do business in the state of California and operated a school there. The California Institute of Physio-Therapy Inc. was organized and defendant and others connected with the latter corporation started a program for physiotherapy, with the intention of having a physiotherapy bill introduced in the Legislature of California. House Bill 1909 (Government's Exhibit 33) was introduced in the General Assembly of California in January, 1945, but was not passed. Substantially the same bill numbered 133 (Government's Exhibit 34) was introduced in the General Assembly of California in its session held in January-February, 1946, which was not passed. A group started to circulate a petition to have the initiative presented to the people of California, pursuant to the Initiative and Referendum law of that state, but they could not qualify and the matter was not presented at a general election in said state.

Petitioner caused a printed bulletin to be transmitted by United States mail to divers persons (Government Exhibit 9) in which it was stated, in substance, that two funds had been set up for use in promoting the passage of said House Bill 1909, to which funds contributions in the form of personal checks in the sums of $50. and $100. may be made. The contributions of $50. would be used in defraying expenses and would not be returned to the contributors. That as to the $100. contributions said bulletin contained the following statement: "If the Bill does not pass, your original check will be returned to you uncashed."

The Government's witnesses, Hubert Harisin, Adolph Frank Lonk, and John G. Popik, and thirty-eight (38) other persons,

who were not witnesses in the trial, contributed $50. and $100. to the respective funds, all transmitting their personal checks to petitioner as directed except the said Harisin, who sent two cashier's checks or bank drafts (Tr. p. 8), the said Lonk, who sent two post office money orders (Tr. p. 13),and the said Popik, who sent two post office money orders (Tr. p. 15). Petitioner caused said cashier's checks or bank drafts and postal money orders to be cashed, giving his reason therefor (Tr. pp. 28, 35). All other remittances were in the form of personal checks which were not presented for payment and which petitioner caused to be returned to the contributors in the total amount of $3800. (Tr. p. 24.) The three Government witnesses above named did not receive a refund of any money from petitioner. Petitioner collected $6300. altogether, from forty-two (42) people (Tr. p. 24). Petitioner transmitted a portion of said funds ($50. contributions) to the Physio-Therapy, Inc., in California, including petitioner's personal contribution of $150.00 which he paid while in California (Tr. p. 24), to be used in seeking to have said bill enacted into law. Said corporation established chapters in California, including American Physio-Therapy Institute, Chapter No. 9, which had a balance on deposit in its account in the Bank of America, Oakland, California, on September 5, 1945, in the amount of $331.87 (Defendant's Exhibit P) (Tr. p. 25), which amount petitioner endeavored to have returned to him for use in refunding the sum of $100. to each of the Government's witnesses, Harisin, Lonk and Popik (Tr. p. 25). Said money was not returned to petitioner, therefore, a refund was not made to said three witnesses.

Petitioner's witnesses, E. L. Frazier, Royal W. Stone, and J. Ray Weaver, testified that they received their original checks or the sum of $100. in cash from petitioner after the legislation was not enacted by the General Assembly of California (Tr. pp. 36, 39, 40).

Petitioner admitted having been previously convicted of offenses, in Indiana and Illinois (Tr. p. 27).

II

Basis Upon Which It Is Contended That the Supreme Court Has Jurisdiction to Review the Judgment in Question.

Jurisdiction is invoked under the general power conferred by Section 240a of the Judicial Code, as amended (28 U. S. C. A. Section 347).

This being a criminal case and the judgment of the District Court having been affirmed by the United States Court of Appeals for the Seventh Circuit, which latter court denied a petition for rehearing, this court has the power to grant a Writ of Certiorari to review said proceeding as provided by the statute hereinabove cited.

III

The Questions Presented.

The questions presented are:

1. Whether the trial court erred in overruling petitioner's motions for acquittal?

2. Whether the verdict of the jury and judgment of the court are sustained by sufficient evidence?

3. Whether the verdict of the jury and judgment of the court are contrary to law?

4. Whether the United States Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court?

5. Whether the United States Court of Appeals erred in denying petitioner's petition for a rehearing?

This petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit questions the correctness of the decision of said court in affirming the judgment of the District Court. The petitioner asserts and believes that the decision of the United States Court of Appeals for the Seventh Circuit is erroneous in that it is contrary to the decisions of this court in the following cases:

Clyatt v. United States, 197 U. S. 207, 222.
Crawford v. United States, 212 U. S. 183, 194.
Fisher v. United States, 66 S. C. R. 1318.
Johnson v. United States, 318 U. S. 189, 200.
Karchmer v. United States (C. C. A. 7, 1932), 61 F. 2, 623.
United Brotherhood of Carpenters and Joiners of America v. United States, 330 U. S. 395, 412.
United States v. Atkinson, 297 U. S. 157, 160.
Wiborg v. United States, 163 U. S. 632, 659.

and of the United States Court of Appeals for the Eighth Circuit in the following case:

Sykes v. United States, 204 Fed. 909, 913, 914 (C. C. A. 8, 1913).
Boatright v. United States (C. C. A. 8, 1939), 105 F. 2, 737, 740.

IV

The Reasons Relied Upon for the Allowance of the Writ.

The Writ of Certiorari as prayed for herein should be granted by the Supreme Court for the reason that the United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law, and has decided a federal question in such a way as to be in conflict with the applicable decisions of the Supreme Court and of the United States Court of Appeals for the Eighth Circuit. The petitioner was convicted of the offense charged in the indictment notwith-

standing the fact that there is a total lack of evidence to sustain the verdict of the jury and judgment of the trial court.

WHEREFORE, the petitioner respectfully prays that a Writ of Certiorari may issue out of and under the seal of this court, directed to the United States Court of Appeals for the Seventh Circuit, to the end that the judgment of said United States Court of Appeals for the Seventh Circuit may be reviewed and reversed by this Honorable Court.

Respectfully submitted,

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Petitioner,

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Of Counsel for Petitioner.

Dated at Indianapolis, Indiana, March 31, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO.

HARRY FRANCIS,

Petitioner,

No. 9698

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I

Errors Relied Upon.

1. The United States Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court.

2. The United States Court of Appeals for the Seventh Circuit erred in denying petitioner's petition for a rehearing of said cause.

3. The verdict of the jury is not sustained by sufficient evidence and is contrary to law.

4. The judgment of the District Court is not sustained by sufficient evidence and is contrary to law.

5. The affirmance of the judgment of the District Court by the United States Court of Appeals for the Seventh Circuit is erroneous in that said Court of Appeals has decided an important question of federal law and has decided a federal question in such a way as to be in conflict with the applicable decisions of the Supreme Court and of the United States Court of Appeals for the Eighth Circuit.

6. The petitioner was adjudged guilty of the offense charged in the indictment notwithstanding the fact that there is a total lack of evidence to sustain the conviction.

II

Jurisdiction.

This court has jurisdiction to grant the annexed petition for Writ of Certiorari and to review this case by virtue of the general powers conferred upon this court by section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Section 347).

III

Summary of Argument.

(a) The United States Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court of the United States for the Southern District of Indiana.

(b) The United States Court of Appeals for the Seventh Circuit erred in denying the petition for rehearing.

(c) The entire record in this cause reveals such a lack of evidence to sustain each and every material allegation contained in the indictment, therefore, the verdict of the jury, that petitioner is guilty as charged in the indictment, and the judgment of the District Court upon said verdict, that petitioner be fined and imprisoned, are not sustained by sufficient evidence, are contrary to law, and constitute a miscarriage of justice.

(d) It was incumbent upon the Government upon the trial of this cause, to prove that petitioner devised and intended to devise a scheme and artifice to defraud chiropractors, naturopaths, and other members of the non-medical healing business, and to obtain money by means of certain alleged false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made, and that petitioner used or caused the United States mail to be used for the purpose of completing the execution of said scheme and artifice and attempting so to do, by substantial evidence and beyond a reasonable doubt.

IV

Argument.

A statement of the facts germane to the issues raised herein is set forth in the petition for Writ of Certiorari, pp. 1 to 8, inclusive.

It is alleged in the indictment, in substance, that petitioner devised a scheme and artifice to defraud chiropractors, naturopaths, and other members of the non-medical healing business, and to obtain money by means of certain alleged false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made. Each count of the indictment is similar except that the mailing of different mail matter to different individuals is alleged.

We call the court's attention to the fact that in the opinion prepared by the United States Court of Appeals, said court does not find and state that there was substantial evidence in the record that petitioner (defendant-appellant) devised a scheme and artifice to defraud the persons and classes of persons referred to or that said evidence was sufficient to prove the guilt of the petitioner (defendant-appellant) beyond a reasonable doubt. Said court merely concluded and stated:

> "A careful study of the record leads to the conclusion that there was sufficient evidence, together with all the reasonable inferences arising therefrom, to warrant the trial court in submitting the matter to the jury."

While said opinion was by a unanimous vote of the judges, upon petition for rehearing being filed and presented to the court, one of the judges (District Judge Duffy) who sat in this case, voted to grant a rehearing. Two of the judges voted

against granting said petition, therefore, a rehearing was denied.

The undersigned respectfully challenge the conclusion and opinion of the United States Court of Appeals for the Seventh Circuit and respectfully urges this Honorable Court to examine the evidence to be found in the Transcript of Record, as we are firmly of the opinion that the entire record reveals such a lack of evidence as to make the conviction of the petitioner a miscarriage of justice.

There is no denial by petitioner that he used and caused the United States mail to be used in communicating with prospective contributors to said funds, and with those who thereafter contributed thereto, therefore, the petitioner presents but one question: Was sufficient, substantial evidence offered in the trial to prove petitioner guilty of the offense charged in the indictment beyond a reasonable doubt? We think not.

When considering the evidence, a synopsis of which follows, we ask this Honorable Court to consider the following.

Certainly the defendant's (petitioner's) plan or scheme to raise funds for use in seeking the enactment of legislation was not fraudulent or unlawful. As stated by the United States Court of Appeals for the Seventh Circuit, in the case of Karchmer v. United States, 61 F. 2, 623:

> "It seems to us that the evidence pointed to the existence of a legitimate scheme rather than one to defraud."

The petitioner was not charged with embezzling funds or converting the funds of other persons to his own use. He was charged with having devised a scheme and artifice to defraud by means of false and fraudulent pretenses, representations and promises.

What false and fraudulent pretenses, representations and

promises did the petitioner allegedly make? The legislation referred to in the indictment was introduced in the General Assembly of California. The petitioner journeyed to California on several occasions where he met persons interested in the passage of said legislation and assisted in formulating a program seeking its passage. Petitioner contributed the sum of $150. of his own funds toward the program, long before he sought contributions from others, and the funds which petitioner sent to his group in California were transmitted for the purpose of promoting passage of said legislation, which all concerned wished to become law. After Bill 1909 failed to pass, the group caused a similar bill to be introduced in said Assembly, which was not passed because it was not within the Governor's call. Up to this point nothing that petitioner wrote to persons who had contributed funds or to those who might be induced to contribute, was false or fraudulent. Of the forty-two (42) persons contributing and remitting to petitioner, the evidence shows without contradiction that only three (3) persons, who did not send their personal checks as requested but sent money orders and cashiers' checks or drafts, which petitioner presented for payment because they could only be held for a certain length of time, failed to receive a refund. In other words, the failure of petitioner to keep his promise to return checks or other form of remittances to three (3) of the forty-two (42) contributors, does not, in our opinion, constitute substantial evidence that petitioner was guilty of the offense charged in the indictment beyond a reasonable doubt, as required by law.

For the jury to find from the evidence offered in the trial of this cause, including all reasonable inferences which may be drawn therefrom, that the petitioner did not intend to preserve the integrity of the $100. contributions, for return to the contributors on failure of enactment of the desired legislation, but that the whole affair was a scheme for the petitioner's own personal enrichment; and that the petitioner

seized upon the efforts of those in California for the dishonest purposes charged in the indictment, all as stated in the opinion of the United States Court of Appeals for the Seventh Circuit, must necessarily be the result of guess, conjecture and speculation on the part of the jurors.

V

The Evidence.

An analysis of the evidence reveals that the Government offered the testimony of only three (3) of the forty-two (42) persons who had contributed to the two funds referred to in the indictment, namely, Hubert Harisin (Tr. pp. 8 to 13 inclusive), Adolph Frank Lonk (Tr. pp. 13, 14), and John G. Popik (Tr. pp. 15-19 inclusive).

The witness, Hubert Harisin, of Burbank, California, testified in substance that he contributed $50. and $100. in the form of cashier's checks or bank drafts (not his own personal checks), to support the Naturopathic Bill numbered 1909; if the bill was not passed the $100. donated to the Naturopathic Fund would be returned to me. I never received any refund. I was interested in the passage of this bill. Dr. Francis wrote me one letter saying he (Francis) would be there (in California) and I could meet him in Los Angeles at his hotel, but I did not (Tr. pp. 8 to 13 inclusive).

The witness, Adolph Frank Lonk, of Palatine, Illinois, testified in substance that he sent Dr. Francis two money orders, one for $50. and one for $100. but never received any money back (Tr. pp. 13, 14).

The witness, John G. Popik, of New York, testified in substance that he knew the defendant, having attended defendant's school in Indianapolis in 1945; that he sent defendant a money order for $50. and a check for $100. but never received

any money back. (We believe witness was in error in stating that he sent a check for $100. as Governments' Exhibits 19a, 19b, 19c and 19d were identified as money orders purchased at Johnson City, New York, and sent to defendant in Indianapolis (R. 15). Witness knew that a Dr. Conover, of Binghampton, New York, contributed $100. to the fund, who got his money back (Tr. pp. 15-19 inclusive).

The following named witnesses for the defendant testified that each contributed $50. and $100. to the two funds, respectively, and that each received his original check or $100. in cash from the defendant after the legislation failed of enactment, namely, E. L. Frazier (Tr. pp. 36-38 inclusive), Royal W. Stone (Tr. p. 39) and J. Ray Weaver (Tr. pp. 39-40 inclusive).

The Government's witness, John W. Evans, a member of the General Assembly of California, testified that he was the author of Bill No. 1909 (Government's Exhibits "B" and 33), which was introduced in said Assembly by the witness in January, 1945. The bill never passed and never became law. Substantially the same bill (Government's Exhibit 34) was brought up before the January-February, 1946, session but was not within the Governor's call and was not passed. California has the Initiative and Referendum law. A group in California started to circulate a petition to have the Initiative presented to the people of California but they could not qualify. Nothing of this nature was presented to the people of California at a general election (Tr. pp. 22, 23).

The Government's witness, John C. Hinshaw, cashier of the Union State Bank, Westfield, Indiana, testified in substance that defendant opened an account in the bank, styled "Harry Francis, Trustee." Defendant also had three other accounts in the bank. Defendant directed the witness with regard to incoming checks, that if there wasn't enough money in one account to apply the check, regardless of how it was drawn,

to another account to save an overdraft. Government's Exhibits 1 and 2 were deposited to the account of Harry Francis, Trustee, June 8,1945. Government's Exhibits 27 and 28 are deposit slips to Harry Francis, Trustee. Defendant does not owe our bank any money (Tr. pp. 19-22).

The petitioner herein, as a witness in his own behalf, testified in substance that we started a program to have a physiotherapy bill introduced in the Legislature of California, when it met in January, 1945, sponsored by the American Physio-Therapy Institute, which was our group. Petitioner was in California two or three times in 1944, with regard to their organization and its work. Petitioner collected $6300.00 altogether from forty-two (42) people (R. 24). Thirty-eight hundred dollars ($3800.00) was returned to the persons who had sent in $100. contributions. Three (3) persons who testified in this trial (Harisin, Lonk and Popik) did not get their money back. Petitioner gave the California Institute of Physio-Therapy, Inc., $1200. at one time. We had $1200. in the bank there and when they broke away, they took $900., leaving $331.87 on deposit. Defendant's Exhibit P is the final bank statement petitioner received, dated September 5, 1945, of the account of American Physio-Therapy Institute, Chapter No. 9, which shows a balance of $331.87 on deposit (Tr. p. 25). The money is still there in the Bank of America. Petitioner did not devise a scheme to defraud these people and take their money away from them but wrote them, if we did not get this straightened out, petitioner would pay it personally. These checks ($100.) were returned in April, 1946. Petitioner donated $150. to the Naturopathic group in California, in February, 1945, when he was there. He has been making an effort to get the $300. back to these people (Harisin, Lonk and Popik). Petitioner's college was thrown into receivership. Government's Exhibit 9 was sent after the bill (1909) had been introduced in the Legislature. The scheme to get money (to support bill 1909) had already been devised before petitioner got to California.

The money wasn't returned to these three (Harisin, Lonk and Popik) because their cashier's checks or bank drafts and money orders had been cashed and used in California and petitioner had not gotten the money back. He was trying to get it back then. We cashed the money orders and cashier's checks because they could only be held a certain length of time. Petitioner made his contribution of $150. in California before he received any money from any persons and before the letter was sent out (Government's Exhibit 9). Defendant admitted having been previously convicted of offenses in Illinois and Indiana (R. 27).

VI

Cases Cited.

Among the cases cited, we call the court's attention to the opinion of Circuit Judge Sanborn, in the case of Sykes v. Untied States, 204 Fed. 909 (C. C. C. 8—April 25, 1913), at pp. 913, 914, where it is stated:

> But there is an exception to this general rule which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception or assignment of error.
>
> The defendant in this case may not be lawfully deprived of his liberty for five years without proof of his guilt beyond a reasonable doubt much less without any substantial evidence of it, and this court cannot disregard his appeal, sit in silence, and permit the perpetration of such an injustice.

In the case of Wiborg v. United States, 163 U. S. 632, at p. 659, Mr. Chief Justice Fuller stated:

> But we think the case as to Peterson and Johansen

stands on a different ground, and that we may properly take notice of what we believe to be a plain error, although it was not duly excepted to. We are of the opinion that adequate proof to that effect is not shown in the record, and that as the case stood, the jury should have been instructed to acquit them.

In the case of Clyatt v. United States, 197 U. S. 207, at p. 222, Mr. Justice Brewer stated:

> We have examined the testimony with great care to see if there was anything which would justify a finding of the fact, and can find nothing. No matter how severe may be the condemnation which is due the conduct of the party charged with a criminal offense, it is the imperative duty of a court to see that all of the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done and the confidence of the public in such administration be maintained. We are constrained, therefore, to order a reversal of the judgment and remand the case for a new trial.

In the recent case of Fisher v. United States, 66 S. C. R. 1318, this court held that in a criminal case it may notice material error within its power to correct even though that error is not specifically challenged, and certainly should do so, even in cases from the District of Columbia where life is at stake.

In the case of Crawford v. United States, 212 U. S. 183, at p. 194, Mr. Justice Peckham stated:

> In criminal cases, courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception.

In the case of United States v. Atkinson, 297 U. S. 157, at p. 160, Mr. Justice Stone stated:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they

> otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

In the case of Johnson v. United States, 318 U. S. 189, at p. 200, Mr. Justice Douglas stated:

> It is true that we may of our own motion notice errors to which no exception has been taken if they would seriously affect the fairness, integrity or public reputation of judicial proceedings.

In the case of United Brotherhood of Carpenters and Joiners of America v. United States, 330 U. S. 395, at p. 412, Mr. Justice Reed stated:

> We have the power to notice a "plain error" though it is not assigned or specified.

In the case at bar we believe the District Court erred in overruling petitioner's motion for an acquittal, filed at the close of the Government's evidence in chief and renewed at the close of all of the evidence; that the United States Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court and in denying a rehearing of this cause, and that the action of each of said courts affects the fairness, integrity and public reputation of judicial proceedings for the reason that the action of each of said courts is not sustained by the record in this cause.

Having considered the evidence, and all the reasonable inferences that may be drawn therefrom, together with the authorities hereinabove cited, we respectfully contend that the Government wholly failed to prove that the petitioner committed the offense alleged in the indictment, by sufficient and substantial evidence and beyond a reasonable doubt, as required by law. All of the evidence was as consistent with innocence as with guilt, therefore, it was the duty of the District Court to have sustained petitioner's motions for acquittal and to have ordered the petitioner discharged from custody. It was also the duty of the United States Court of Appeals for the Seventh Circuit to have reversed the judgment of the

District Court and to have granted the petition for rehearing, for the same reasons.

Respectfully submitted,

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Petitioner,

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Dated at Indianapolis, Indiana, March 31, 1949.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 721

HARRY FRANCIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

The sole question presented by the petition for a writ of certiorari involves the sufficiency of the evidence to support petitioner's conviction of using the mails in the execution of a scheme to defraud. He was convicted on six counts, each charging a different use of the mails (R. 1–4, 46), and was sentenced generally to imprisonment for three and one-half years and to pay a fine of $500 (R. 48).

The prosecution resulted from petitioner's solicitation by mail of members of the non-medical healing profession to contribute to two funds

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which he represented had been established to secure the passage by the California legislature of a bill providing for the licensing of such practitioners. Petitioner urged the persons so solicited to contribute $100 each, by check, to a so-called "Naturopathic Trust Fund," and he represented that such contributions would "not be used unless the Bill is passed and licenses are issued. When you send in your check, it is put in a safety deposit box, to be used to defray expenses, only if the Bill passes. This check is not cashed before the Bill is passed and in the event that the Bill does not pass, your original check will be returned to you." (R. 74–75.) Fifty-dollar contributions were solicited for a fund for so-called operating costs (*ibid.*). The bill did not pass. The fraudulent nature of the scheme was amply established at the trial by the testimony of three of the victims and other evidence showing that their $100 contributions were not held in trust as promised but were immediately deposited in petitioner's bank accounts and were not returned. The evidence is summarized in the opinion of the Court of Appeals (R. 74–79; 172 F. 2d 619), and we deem it unnecessary to repeat it here.

Both courts below having upheld the sufficiency of the evidence to warrant submission of the case to the jury, we submit that there is no occasion for further review by this Court. See *Kann* v.

United States, 323 U. S. 88, 93; *United States* v. *Johnson*, 319 U. S. 503, 518; *Delaney* v. *United States*, 263 U. S. 586, 589–590.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 721

HARRY FRANCIS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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SENTINEL PRINTING INC., INDIANAPOLIS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

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HARRY FRANCIS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

No. 9698

PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Comes now the petitioner, Harry Francis, and respectfully petitions this Honorable Court for a rehearing in the above entitled cause, for each of the following reasons and upon each of the following grounds:

1. The evidence is as consistent with the innocence of the petitioner as with his guilt.

2. In order for the petitioner to be convicted of the crime charged in the indictment, his guilt must be proved by sub-

stantial evidence and the jury may not be left to conjecture or suspicion.

3. The jury may not speculate upon the guilt of the petitioner, or choose between equally permissive inferences of guilt or innocence.

AUTHORITIES

Glasser v. United States, 315 U. S. 60 (116 F. 2, 690, certiorari granted 313 U. S. 551).

United States v. Bruno, 67 Supreme Court 211 (Reversing 153 F. 2, 843).

Scott v. United States, 145 F. 2, 405 (Certiorari denied, 323 U. S. 801).

In the brief in opposition to the petition for a writ of certiorari, filed in this cause by the Solicitor General, it is stated:

> Both courts below having upheld the sufficiency of the evidence to warrant submission of the case to the jury, we submit that there is no occasion for further review by this Court (Br. 2-3).

We sincerely believe that the evidence introduced in the trial of this cause falls short of the degree of proof required to sustain a verdict of guilty, therefore, there is occasion for further review by this Court. Petitioner's liberty is at stake, and we respectfully suggest that petitioner should not be precluded from having his case reviewed by this Honorable Court merely because the District Court and the Court of Appeals found the evidence sufficient to warrant submission of the case to the jury. We plead with the Court to heed the words of Circuit Judge Sanborn, in the case of Sykes v. United States, 204 Fed. 909:

> The defendant in this case may not be lawfully deprived of his liberty for five years without proof of his guilt beyond a reasonable doubt much less without any substantial evidence of it, and this court cannot disregard his appeal, sit in silence, and permit the perpetration of such an injustice.

It is true that the jury is the judge of the facts and the credibility of the witnesses, however, it is also true that in

the event the evidence is as consistent with the innocence of the petitioner as with his guilt, a verdict of guilty should not be permitted to stand and the accused should not be fined and imprisoned. Glasser v. United States, 315 U. S. 60.

This Court has held that to be convicted of a crime, the crime charged must be proved and the jury may not be left to conjecture or suspicion. United States v. Bruno, 67 Supreme Court 211.

This Court has also approved the principle of law that the jury may not speculate upon the guilt of the defendant, or choose between equally permissive inferences of guilt or innocence. Scott v. United States, 145 F. 2, 405, certiorari denied 323 U. S. 801.

We shall not review the evidence submitted in the trial of this cause, which was discussed fully in petitioner's brief in support of his petition for a writ of certiorari. We do wish to re-emphasize the fact that the petitioner's testimony was not contradicted in any respect, including his statement that the contributions which he received from divers persons, for the purposes stated, were returned to all of the contributors except the three (3) persons who testified as witnesses for the Government in the trial of this cause. The reason for not returning the contributions to these three persons was explained by the petitioner.

In our opinion the verdict of the jury in this case resulted solely from conjecture and suspicion on the part of the jurors. The Court will note that the Government failed to call as witnesses all of the persons who contributed to the funds received by the petitioner. The record is silent as to most of them. The petitioner produced several witnesses residing in or near the situs of the trial, who testified that they had contributed money for the purposes indicated and that, upon failure of the General Assembly of California

to pass the desired legislation, these witnesses received their original checks or their equivalent in money from the petitioner.

We cannot believe that it is the law that the fact that the petitioner had not refunded the sum of One Hundred Dollars to the three witnesses for the Government, who had not sent bank checks to petitioner as requested but had sent cashier's checks or drafts or postal money orders to the petitioner, which petitioner presented for payment for the reasons stated, whereas the uncontradicted evidence proves that petitioner had returned the bank checks to all other contributors remitting by check, constitutes sufficient and substantial evidence that the petitioner devised a scheme and artifice to defraud those persons who testified for the Government or any other persons who contributed.

Nor do we believe that the petitioner's plan or scheme to procure funds for the purpose indicated was a fraudulent one.

We respectfully make this final appeal to this Honorable Court for a rehearing and that a writ of certiorari issue herein.

Respectfully submitted,

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June 10, 1949.

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